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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PAUL FREDERICK SMELTZER, Defendant and Appellant.	D054612 (Super. Ct. No. CN24673)

APPEAL from an order of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed.

A complaint charged Paul Frederick Smeltzer with cultivating marijuana (Health & Saf. Code,[1] § 11358) and possessing marijuana for sale (§ 11359). At the preliminary hearing, the trial court found Smeltzer cultivated and possessed marijuana for personal medical purposes as provided under section 11362.5, subdivision (d) of the

1 All statutory references are to the Health and Safety Code unless otherwise specified.

Compassionate Use Act of 1996 (CUA) and dismissed both charges.[2] Smeltzer subsequently petitioned under Penal Code section 851.8 to seal and destroy his arrest records on the ground that he was factually innocent of both charges. He also filed a motion for the return of his property. The trial court denied Smeltzer's petition to seal and destroy records, granted his motion for return of property and ordered law enforcement to return all items of property *except* the marijuana.

On appeal, Smeltzer contends he is factually innocent because no reasonable cause existed to believe he committed the charged offenses. He further contends due process requires that police return his medical marijuana.

The People argue that because Smeltzer admitted he was giving away his medical marijuana to friends and to his adult son, and because such conduct is beyond what the CUA authorizes, he did not meet his burden of proving factual innocence. The People further argue that the trial court's refusal to return the marijuana to Smeltzer is a nonappealable order, Smeltzer did not seek relief by writ of mandate and no unusual or extraordinary circumstances exist to warrant this court exercising its discretion to treat that portion of his appeal as a writ petition.

We conclude Smeltzer did not carry his burden to show factual innocence. We also conclude the order denying the return of Smeltzer's medical marijuana is nonappeable and he has not shown exceptional or unusual circumstances that warrant this court treating that portion of his appeal as a writ petition. We therefore affirm.

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[2] The People did not challenge the dismissal of the criminal charges against Smeltzer. Thus, we do not decide in this appeal whether that dismissal was proper.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Search and Arrest*

In May 2008, Detective Eric Hoppe searched Smeltzer's home under a warrant. Upstairs Hoppe found a closet that had been turned into a nursery for growing marijuana. In a separate upstairs bedroom Hoppe found a sealed wooden enclosure containing 12 flowering marijuana plants, marijuana growing equipment and a scale. He also discovered six glass jars containing marijuana inside a safe. Each jar was sealed and labeled with different names. Outside, Hoppe found 12 vegetative marijuana plants. The total amount of marijuana found in Smeltzer's home was 290 net grams, or just over half a pound.

When interviewed, Smeltzer told Hoppe he had a medical marijuana card and grew and used marijuana because of a disability.[3] Smeltzer also told Hoppe that the marijuana was for his personal use and he did not sell it or give it away. However, Smeltzer also said he occasionally gave the marijuana to friends and his adult son. Specifically, he told Hoppe, "When my friends come over I will let them smoke with me and I will give my son some every once in a while."[4] Smeltzer admitted he was not a medical marijuana caregiver and used five ounces of marijuana per month.

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3 Hoppe did not find a medical marijuana card during the search of Smeltzer's home. However, after his arrest Smeltzer produced doctors' recommendations for use of medical marijuana.

4 This statement was uncontradicted.

B. *Preliminary Hearing*

At the preliminary hearing, Hoppe testified he believed the marijuana possessed by Smeltzer was for sale based on the amount of marijuana police found during the search, the way it was labeled and kept in sealed jars, and the fact Smeltzer was in possession of a scale and was unable to produce a medical marijuana card. However, Hoppe acknowledged he had limited training and experience dealing with medical marijuana.

Medical marijuana expert William Britt testified on behalf of Smeltzer. Britt opined that the cultivation and storage of marijuana by Smeltzer appeared to have been for Smeltzer's personal use. Britt also testified that five ounces of marijuana per month is normal for a moderate to heavy medical marijuana user.

Because Smeltzer possessed a valid recommendation from a medical doctor for the use of medical marijuana on the date of his arrest, and because the amount of marijuana he possessed was reasonable according to Britt's testimony, the trial court dismissed both charges against Smeltzer.

C. *Motions and Appeal*

After dismissal, Smeltzer filed a petition under Penal Code section 851.8 for a judicial determination of factual innocence. Smeltzer contended he should be found factually innocent in light of the dismissal of both charges and the finding that he lawfully cultivated and possessed the marijuana under the CUA. The trial court

disagreed, finding that Smeltzer did not meet his burden to show factual innocence because Smeltzer admitted he occasionally gave away his medical marijuana to others.

Smeltzer also filed a motion for return of property seized by law enforcement. The trial court granted that motion in part, ordering that police return all of Smeltzer's property except the marijuana.

DISCUSSION

A. *Factual Innocence*

Penal Code section 851.8, subdivision (c), provides: "In any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court that dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made. . . . If the court finds the petitioner to be factually innocent of the charges for which the arrest was made, then the court shall grant the relief as provided in subdivision (b)."

Under subdivision (b) of Penal Code section 851.8, the defendant may petition for the sealing and destruction of any arrest records relating to the charge. "The trial court then holds a hearing at which 'the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the [defendant] committed the offense [charged]. If the court finds that this showing of no reasonable cause has been made by the petitioner, then the burden of proof shall shift to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense [charged].' " (*People v. Adair* (2003) 29 Cal.4th 895, 902-903, quoting Pen. Code, § 851.8, subd. (b).)

" 'A finding of factual innocence and an order for the sealing and destruction of records pursuant to this section shall not be made unless the court finds that no reasonable cause exists to believe' the defendant committed the offense charged." (*People v. Adair*, *supra*, 29 Cal.4th at p. 904, quoting Pen. Code, § 851.8, subd. (b).) "In other words, the trial court cannot grant relief if *any* reasonable cause warrants such a belief. [Citation.] ' " 'Reasonable cause' " ' is a well-established legal standard, ' "defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." ' [Citations.] To be entitled to relief under [Penal Code] section 851.8, '[t]he arrestee [or defendant] thus must establish that facts exist which would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the person arrested [or acquitted] is guilty of the crimes charged.' " (*People v. Adair*, *supra*, 29 Cal.4th at p. 904, quoting *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1056.)

Accordingly, Penal Code section 851.8 "establishes an objective standard for assaying factual innocence. From this determination, it necessarily follows that a reviewing court must apply an independent standard of review and consider the record de novo in deciding whether it supports the trial court's ruling." (*People v. Adair*, *supra*, 29 Cal.4th at p. 905.)

" '[Penal Code] [s]ection 851.8 is for the benefit of those defendants who have not committed a crime. It permits those petitioners who can show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors

justified official action—to purge the official records of any reference to such action. . . . Hence, much more than a failure of the prosecution to convict is required in order to justify the sealing and destruction of records under [Penal Code] section 851.8.' " (*People v. Adair, supra*, 29 Cal.4th at p. 905.) " 'Establishing factual innocence . . . entails establishing as a prima facie matter not necessarily just that the [defendant] had a viable substantive defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest him in the first place.' " (*People v. Adair, supra*, 29 Cal.4th at p. 905, fn. omitted, quoting *People v. Matthews, supra*, 7 Cal.App.4th at p. 1056.)

The controversy here concerns whether Smeltzer can establish under the CUA that he was factually innocent of the charges of cultivation and possession for sale of marijuana. In denying Smeltzer's petition, the court noted Smeltzer admitted he shared his marijuana with others, including friends and his adult son, and observed, "I can't see how [you, Smeltzer] can be factually innocent under the [CUA] if you are sharing it with somebody who doesn't have the prescription. To me, that's simple." We agree.

1. *The CUA*

The CUA, passed by voters in 1996, relieves a defendant of criminal liability for cultivation or possession of marijuana if the cultivation or possession was for the "personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).) In *People v. Mower* (2002) 28 Cal.4th 457, 470, our high court rejected the defendant's argument that the CUA provided an absolute defense to arrest and prosecution for certain marijuana offenses and concluded that the statute provides a *limited* defense from prosecution for cultivation and possession

of marijuana. (*Ibid.*) Thus, the defense accorded by the CUA is limited to "patients and primary caregivers only, [and] to prosecution for only two criminal offenses: section 11357 (possession) and section 11358 (cultivation)." (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1400.)

Significant to the case at hand, the CUA does *not* apply to the offenses of possession for sale (§ 11359) or furnishing marijuana (§ 11360). (§ 11362.5, subd. (d); see also § 11362.5, subd. (b)(2) [the CUA does not immunize the "diversion of marijuana for nonmedical purposes"; *People v. Wright* (2006) 40 Cal.4th 81, 99 [jury determination that marijuana was possessed for sale rather than personal use rendered failure to give instruction on CUA defense harmless with regard to charge of transportation of marijuana]). Thus, if a medical marijuana patient goes beyond the immunized range of conduct, the patient subjects him- or herself to the full force of the criminal law. (*People v. Mentch* (2008) 45 Cal.4th 274, 289.)

2. *Analysis*

As the trial court before us, we conclude Smeltzer did not satisfy his burden to show factual innocence. (See *People v. Adair, supra*, 29 Cal.4th at p. 905.) Indeed, at the preliminary hearing, the trial court stated: "There was probable cause to arrest. I don't have a problem with that." We note in this regard that during their search of Smeltzer's home police found six glass jars of marijuana in a safe that were sealed and labeled with different names and a scale. Thus, even if we assume the CUA applied to

the charge of possession for sale,[5] on this record Smeltzer did not establish facts that " 'would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the person arrested . . . is guilty of the crimes charged.' " (See *People v. Adair*, *supra*, 29 Cal.4th at p. 904.)

Here, the record shows Smeltzer admitted he gave away (e.g., furnished) marijuana to others. Such conduct is also outside the CUA, which, as noted, limits the use of medical marijuana to a patient's *personal* medical needs. (§ 11362.5, subd. (d); *People v. Mower*, *supra*, 28 Cal.4th at pp. 470-471.) Thus, we also conclude Smeltzer did not satisfy his burden to show he is factually innocent of the charge of cultivating marijuana. (*People v. Adair*, *supra*, 29 Cal.4th at pp. 905-907.)

B. *Return of Marijuana*

"Although the trial court has the inherent authority to entertain the motion for return of property seized under color of law, the right to appeal is wholly statutory and a judgment or order is not appealable unless it is expressly made so by statute." (*People v. Hopkins* (2009) 171 Cal.App.4th, 305, 308, citing *People v. Mazurette* (2001) 24 Cal.4th 789, 792.) "An order denying a motion for return of property—whether or not the property has been admitted as evidence in a criminal trial—is not among the matters for

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[5] Fortunately for Smeltzer, it appears the trial court erred during the preliminary hearing when it determined that the CUA applied to that charge. (See § 11362.5, subd. (d); *People v. ex rel Lungren v. Peron*, *supra*, 59 Cal.App.4th at p. 1393 [rejecting argument that the CUA provided a valid defense to charge of selling or giving away marijuana]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1546 [concluding the CUA does not serve as an " 'open sesame' regarding the possession, transportation and sale of marijuana"].)

which an appeal is permitted under Penal Code section 1237," which "authorizes appeals from 'any order made after judgment, affecting the substantial rights of the parties.' " (*Ibid.*, quoting Pen. Code, § 1237, subd. (b).)

"A motion for return of property is a separate procedure from the criminal trial and is not reviewable on an appeal from an ultimate judgment of conviction." (*People v. Hopkins*, *supra*, 171 Cal.App.4th at p. 308.) "If the 'separate proceeding' of a motion for return [of property] is regarded as a criminal proceeding, for which the right to appeal is governed by Penal Code section 1237, an order denying the motion is nonappealable because such an order is not listed among any of the matters for which an appeal is authorized by Penal Code section 1237." (*Ibid*, citing *People v. Gershenhorn* (1964) 225 Cal.App.2d 122, 125.)

Thus, the "proper avenue of redress" for the denial of a nonstatutory motion to return property "was through a petition for writ of mandate, not an appeal."[6] (*People v. Hopkins*, *supra*, 171 Cal.App.4th at p. 308; see also *People v. Gershenhorn*, *supra*, 225 Cal.App.2d at p. 126 [discretionary review by writ of mandate available for order denying release of property].) Here, the record shows Smeltzer did not file a petition for writ of mandate at the time he filed his appellate brief.

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6 In contrast, we are not here dealing with a denial of a statutory motion for return of property due to an unlawful search or seizure, as provided in Penal Code sections 1536 1538.5, 1539 and 1540, inasmuch as "there was no motion to suppress evidence made on the ground that the marijuana had been unlawfully seized." (*People v. Hopkins*, *supra*, 171 Cal.App.4th at p. 308.)

Although the People correctly assert that a writ petition, not an appeal, is required to challenge the court's denial of Smeltzer's nonstatutory motion to return property, an appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate. (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367.) That discretion, however, should be exercised only in unusual circumstances and be compelling enough to indicate the propriety of a writ petition in the first instance. (*Ibid*.)

For example, in *Olson v. Cory* (1983) 35 Cal.3d 390, 400-401, our Supreme Court determined it was appropriate to treat an appeal from a nonappealable order as a petition for an extraordinary writ where requiring the parties to wait for a final judgment might lead to unnecessary trial proceedings, the briefs and record included in substance the necessary elements for a proceeding for a writ of mandate, there was no indication the trial court would appear as a party in a writ proceeding, the appealability of the order was not clear, and all the parties urged the court to decide the issue rather than dismiss the appeal. The court concluded that dismissing the appeal rather than exercising its power to reach the merits would be unnecessarily dilatory and circuitous. (*Id*. at p. 401.)

No such circumstances have been offered by Smeltzer to compel us to treat the nonappealable order as a writ petition. Indeed, Smeltzer's opening brief does not address the issue. Nor does he respond in his reply brief to the argument made by the People that an order denying a nonstatutory motion for return of property is not appealable, or ask this court to exercise its discretion and treat this portion of his appeal as a writ petition. Because Smeltzer presented no reason for proceeding by way of appeal rather than by

writ petition, we conclude he did not satisfy his burden to show extraordinary or unusual circumstances.[7]

DISPOSITION

We affirm the trial court's order (1) denying Smeltzer's Penal Code section 851.8 petition to seal court files and destroy arrest records in connection with this case and (2) refusing to return the marijuana that was confiscated by police.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.

[7] In any event, even if we reached the merits we would conclude Smeltzer was not entitled to a return of the marijuana in light of the fact he was unable to establish factual innocence in connection with the charged offenses.